IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.04.2006

Coram

The Honourable Mr. JUSTICE K.MOHAN RAM

Writ Petition Nos.35348, 32093, 32094, 32095, 32096, 32097, 33789, 32098, 32099, 32100 of 2004,
11774, 25955, 25956, 25957, 30385, 30386, 1954, 28442, 28443, 28444, 28445, 28446, 28447, 28448, 28449, 28450, 23048, 30678, 33008, 33009, 33010, 31802 and 31803 of 2005 and
328, 329, 330, 1355, 3375, 3376, 4417, 4981, 8523 of 2006
and Connected pending WPMPs.

Ponni Sago Factory ..Petitioner in WP 35348/04

Sri Chennai Andavar Sago Factory
rep. by its Partner V.Natesan ..Petitioner in WP 32093/2004

Yoga Prakash Rice and Sago Factory
rep. by the Proprietor S.Duraisamy ..Petitioner in WP 32094/04

Sri Annamar Sago Factory,
rep. by its Proprietor
M.Ranga Swamy ..Petitioner in WP 32095/04

P.Samyappan ..Petitioner in WP 32096/04

Sri Venkateshwara Sago Factory,
rep. by its Proprietor, K.Ramasamy ..Petitioner in WP 32097/04

Nithya rice & Sago Factory
Thulakkanur ..Petitioner in WP 33789/04

Sri Ganesha Sago Factory,
rep. by its Proprietor L.Shanmugam ..Petitioner in WPs 32098/04, 32099/04

Sridhar Sago Factory
rep. by its Partner R.Devarajan ..Petitioner in WP 32100/2004

Arul Muruganstarch Factory
represented by its Proprietor
K.Ramasamy ..Petitioner in WP 11774/05

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P.Sengottaiyan,
Proprietor Bharathi Sago Factory ..Petitioner in WP 25955/05,25956/05, 25957/05

Sakthi Sago Factory represented by its Proprietor B.Sathikumar ..Petitioner in WP 30385/05

R.Subramanian, Proprietor
Jayavel Sago Factory ..Petitioner in WP 30386/05, 33008/05, 33009/2005

Srivel Murugan Sago Factory represented by its Proprietor S.R.Krishnan ..Petitioner in WP 1954/2005

Sri Venkateswara Sago Factory represented by its Partner K.Ramasamy ..Petitioner in WP 28442/05 and 28443/05

Arul Murugan Starch Factory represented by its Proprietor K.Ramasamy ..Petitioner in WP 28444/05 and WP 28445/05

Sri Murugan Sago Factory represented by its Proprietor K.Venkatachalam ..Petitioner in WP 28446/05 & WP 28448/05, 28449/05, WP 4981/06

Praba Industrial Starch Factory represented by its Proprietor K.Sengotuvel ..Petitioner in WP 28447/05

Selvam Sagi Factory represented by its Proprietor K.Tamil Selvan ..Petitioner in WP 28450/05

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Arul Murugan Sago Factory represented by its Proprietor K.Natesan ..Petitioner in WP 23048/05

Sri Saraswathi Sago Factory rep. by its Proprietor R.Durai Raj ..Petitioner in WP 30678/05

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Praba Industrial Starch
Factory represented by its Proprietor
K.Sengottuvel ..Petitioner in WP 33010/2005

A.R.G.& Co. Raja Sago Factory
represented byits Partner,
S.R.Rajan ..Petitioner in WP 31802/05 & 31803/05

R.Sekar, Proprietor
Sellaiamman Sago Factory ..Petitioner in WP 328/05, 329/05 and WP 330/05

Sakthi Sago Factory represented
by its proprietor, B.Sakthikumar ..Petitioner in WP 1355/06

A.Subramani
Proprietor Subramani Sag Factory ..Petitioner in WP 3375/06

Sri. Palani Andavar Sago
Factory represented by its
Proprietor P.Muthulingam ..Petitioner in Wp 3376/06

A.Arumugam
Proprietor, Sri Senthil Andavar
Sago Factory, Pudupet ..Petitioner in WP 4417/06

P.Anbarasu
Proprietor, Velumani
Sago Factory, Attur ..Petitioner in WP 8523/06.

The Deputy Commercial Tax Officer,
Attur (Rural) Assessment Circle,
Attur. R1 in W.P.Nos. 32094/04 32096/04, 33789/04, 25955/05, 25956/05, 25957/05, 30385/05, 30386/05, 28450/05, 30678/05, 33008/05, 33009/05, 33010/05, 1355/06.

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1. The Deputy Commercial Tax Officer,
Attur (Town)

Respondent in w.P.Nos. 328/06, 329/06, 330/05, 3375/06, 3376/06, 4417/06, 8523/06

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1. The Salem Starch and sago
Manufactures Service Industrial
Co-operative society Limited,
Omalur Main Road, Salem - 636 302.

2. The State of Tamilnadu
represented by the Secretary to
Government ,
Department of Commercial Taxes,
and Religious Endownments,
Fort St. George, Chennai-9. ... Respondents 2 & 3 in W.P. 35348/04, 32093/04, 32094/04, 32095/04, 32096/04, 32097/04, 33789/04, 32098/04, 32099/04, 32100/04, 11774/05, 1954/05

The Deputy Commercial Tax Officer,
Suramangalam Circl, Salem .. R1 in W.P.No.35348/04, 11774/05, 28446/05, 28448/05, 28449/05, 4981/06

The Commercial Tax Officer,
Suramangalam assessment Circl,
Salem R1 in W.P.No.32093/04, 32095, 32097, 32098, 32099, 32100, 11774/05

1. The Commercial Tax Officer
Annadhanapatti circle
Salem ... Respondent in WP NOS. 31802/05, 31803/05

1. The Deputy commercial Tax Officer
Hosur ... Respondent in WP NOS. 1954/05

1. The Deputy Commercial Tax Officer
Rasipuram .. Respondent in WP NOS. 23048 of 2005

1. The Commercial Tax Officer
Suramangalam Circle, Salem .. Respondent in WP 28442 to 28445 of 2005

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1. The Deputy Commercial Tax
Officer, Kallanatham Post
Athur Taluk, Salem District .. Respondent in WP 28447 of 2005

For Petitioners in all WPs : Mr. N.Prasad.
For Respondents in all WPs : Mr.S.Manohar Sundaram,
Government Advocate (Taxes).

Petition presented to this Court under Art 226 of the Constitution of India To call for the records on the files of the first respondent herein in TNGST No.2802147/2002-2003 dated 26.10.2004 in WP.35348/04
TNGST/2801157/2002 - 03 dated 18.10.04 in WP.No.32093/04
TNGST/3260707/2002 - 03 dated 19.08.04 in WP.No.32094/04
TNGST/2800276/2002 - 03 dated 18.10.04 in WP.No.32095/04
TNGST/3261073/2002 - 03 dated 31.08.04 in WP.No.32096/04
TNGST/2800157/2002 - 03 dated 18.10.04 in WP.No.32097/04
TNGST/3261145/2002 - 03 dated 31.08.04 in WP.No.33789/04
TNGST/2800744/2002 - 03 dated 06.10.04 in WP.No.32098/04
TNGST/2800744/2002 - 03 dated 06.10.04 in WP.No.32099/04
TNGST/2800023/2002 - 03 dated 06.10.04 in WP.No.32100/04
TNGST/2800383/2002 - 03 dated 14.02.05 in WP.No.11774/05
TNGST/3260244/2001 - 02 dated 01.07.05 in WP.No.25955/06
TNGST/3260244/2002 - 03 dated 01.07.05 in WP.No.25956/05
TNGST/3260244/2003 - 04 dated 01.07.05 in WP.No.25957/05
TNGST/3261407/2002 - 03 dated 25.08.05 in WP.No.30385/05
TNGST/3260345/2001 - 02 dated 25.08.05 in WP.No.30386/05
TNGST/3340258/2002 - 03 dated 30.11.04 in WP.No.1954/05
TNGST/2800157/2003 - 04 dated 18.08.05 in WP.No.28442/05
TNGST/2800157/2003 - 04 dated 18.08.05 in WP.No.28443/05
TNGST/2800383/2001 - 02 dated 18.08.05 in WP.No.28444/05
TNGST/2800383/2001 - 02 dated 18.08.05 in WP.No.28445/05
TNGST/2800490/2001 - 02 dated 18.08.05 in WP.No.28446/05
TNGST/3261407/2002 - 03 dated 01.07.05 in WP.No.28447/05

and issue a writ of certiorari or any other appropriate writ, order of direction under Article 226 of the constitution of India and quashing the said proceedings of the first Respondent herein

TNGST/2800490/2002 - 03 dated 18.08.05 in WP.No.28448/05
TNGST/2800490/2003 - 04 dated 18.08.05 in WP.No.28449/05
TNGST/3261297/2002 - 03 dated 06.10.05 in WP.No.28450/05
TNGST/3161691/2002 - 03 dated 16.05.05 in WP.No.23048/05
TNGST/3261052/2003 - 04 dated 25.08.05 in WP.No.30678/05
TNGST/3260345/2002 - 03 dated 09.09.05 in WP.No.33008/05
TNGST/3260345/2003 - 04 dated 12.09.05 in WP.No.33009/05
TNGST/3260415/2003 - 04 dated 12.09.05 in WP.No.33010/05
TNGST/2760880/2001 - 02 dated 23.08.05 in WP.No.31802/05
TNGST/2760880/2002 - 03 dated 23.08.05 in WP.No.31803/05

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TNGST/3140874/2001 - 02 dated 28.11.05 in WP.No.328/06
TNGST/3140874/2002 - 03 dated 28.11.05 in WP.No.329/06
TNGST/3140874/2003 - 04 dated 16.12.05 in WP.No.330/06
TNGST/3261407/2003 - 04 dated 09.09.05 in WP.No.1355/06
TNGST/3140456/2003 - 04 dated 05.01.06 in WP.No.3375/06
TNGST/3141163/2003 - 04 dated 05.01.06 in WP.No.3376/06
TNGST/3140556/2003 - 04 dated 25.01.06 in WP.No.4417/06
TNGST/2800490/2004 - 05 dated 06.02.06 in WP.No.4981/06
TNGST/3140509/2003 - 04 dated 25.01.06 in WP.No.8523/06
In his TNGST/2801157/2002-03 dated 18.10.2004 in WP.32093/04
''/3260707/2002-03 dated 19.8.2004 in WP.32094/04
''/2800276/2002-03 dated 18.10.2004 in WP.32095/04
''/3261073/2002-03 dated 31.8.2004 in WP.32096/04
''/2800157/2002-03 dated 18.10.04 in WP.32097/04
''/3261145/2002-03 dated 31.8.04 in WP.33789/04
''/2800744/2001-02 dated 6.10.04 in WP.32098/04
''/2800744/2001-02 dated 6.10.04 in WP.32099/04
''/2800023/2002-03 dated 6.10.04 in WP.32100/04
''/2800383/2002-03 dated 14.2.05 in WP.11774/05
''/3260244/2001-02 dated 1.7.05 in WP.25955/05
''/3260244/2002-03 dated 1.7.05 in WP.25956/05
''/3260244/2003-04 dated 1.7.05 in WP.25957/05
''/3261407/2002-03 dated 25.8.05 in WP.30385/05
''/3260345/2001-02 dated 25.8.05 in WP.30386/05
''/3340258/2002-03 dated 30.11.04 in WP.1954/05
''/2800157/2003-04 dated 18.8.05 in WP.28442/05
''/2800883/2001-02 dated 18.8.05 in WP.28444/05
''/-do- -do- in WP.28445/05
''/2800490/2001-02 dated 18.8.05 in WP.28446/05
''/3261407/2002-03 '' 1.7.05 in WP.28447/05
''/2800490/2002-03 dated 18.8.05 in WP.28448/05
''/2800490/2003-04 dated 18.8.05 in WP.28449/05
''/3261297/2002-03 dated 6.10.04 in WP.28450/05
''/3161691/2002-03 dated 16.5.05 in WP.23048/05
''/3261052/2003-04 dated 25.8.05 in WP.30678/05
''/3260345/2002-03 dated 9.9.05 in WP.33008/05
''/3260345/2003-04 dated 12.9.05 in WP.33009/05
''/3260415/2003-04 '' '' in WP.33010/05
''/2760880/01-02 dated 23.8.05 in WP.31802/05
''/2760880/02-03 dated 23.8.05 in WP.31803/05
''/3140874/01-02 dated 28.11.05 in WP.328/06
''/3140874/02-03 dated 28.11.05 in WP.329/06
''/3140874/03-04 dated 16.12.05 in WP.330/06
''/3261407/2003-04 dated 9.9.05 in WP.1355/06
''/3140456/2003-04 dated 5.1.06 in WP.3375/06
''/3141163/2003-04 dated 5.1.06 in WP.3376/06
''/3140556/2003-04 dated 25.1.06 in WP.4417/06
''/2800490/2004-05 dated 6.2.06 in WP.4981/06
''/3140509/2003-04 dated 25.1.06 in WP.8523/06

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C O M M O N O R D E R

In these batch of writ petitions the assessment orders / revised assessment orders passed by the respective assessment officers have been challenged on the following grounds:

a) The order of the first respondent is arbitrary, irrational and violative of Articles 14, 19(1)(g) and 265 of the Constitution of India;

b) The impugned assessment is a mala fide exercise of power lacking in banafides for the collateral purpose of raising an arbitrary and disproportionate liability to hurt the petitioners;

c) The condition precedent for the exercise of power under Section 12 (2) is incorrectness and incompleteness of the return submitted by the assessee and for this purpose no objective facts have been examined and evidence established. There is no finding of even a single proved purchase or sales omission. The records maintained in the course of business of the petitioners have not been shown to the unworthy of acceptance.

d) The flat rate assessment by arbitrarily adopting an alleged consumption of 5 units for sago and 6 units for starch as the energy consumption has no independent or authentic support, nor established by any proven methodology adopted in the trade.

e) The first respondent cannot adopt a flat rate method for best judgment assessment ignoring the special features of each assessee, like the power consumption, the load connected, the horse power employed, the machine driven operation as against manual operation, the age of the machinery including the diverse sequence of operations submitted before the first respondent.

f) The electricity consumption by itself cannot be the basis for the best of judgment assessment and on the authority of the ruling of this Court in 32 STC 542 (Kalyani Oil Mills Vs. State of Madras) and that of the other High Courts, the impugned demand is arbitrary and the resultant figures are equally perverse.

2. There is no dispute that the petitioners in all these writ petitions are running small scale units for the manufacture of sago and starch, and are registered dealers under the Tamil Nadu General Sales Tax Act, 1959 and Central Sales Tax Act, 1956 with the first respondent / assessing officer. For the manufacture of sago, the principal raw material is tuber of sago. These are purchased from agriculturists in and around Salem and Dharmapuri Districts. The petitioners have been selling their goods to Salem Starch and Sago Manufacturers Service Industrial Co-operative Society Limited (hereinafter referred to as the "Sago Serve").

3. It is the contention of the petitioners that it was alleged in the meeting held on 22.07.2004 the manufacturers were supplying sago to traders and not to the Sago Serve, resulting in loss of revenue and that demands will be raised based on electricity consumption and on the basis

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of octroi details in Maharashtra. It is the contention of the petitioners that there is no evidence to show that the petitioners had effected sales within or outside the State without payment of tax. According to the petitioners, in the above said background, the Commercial Tax Department have been required to issue the best of judgment demands on a flat rate basis of electricity consumption. It is the allegation of the petitioners that demands are being raised at the instance of the Sago Serve for promoting its affairs and brow beat the innocent small scale units and not for any bonafide purpose. The further allegation of the petitioners is that the Sales Tax Department is employed to create monopoly of procurement for the sago serve as self-evident from the circulars of the Sago Serve.

4. It is the case of the petitioners that they maintain regular books of accounts and all purchases are supported by vouchers. All the sales are supported by invoices and deliveries are under statutory way bill and the petitioners effected local sales to buyers with invoices and charge sales tax. Further the petitioners effect sales through agents, who are registered dealers. According to the petitioners, the sales are faithfully reported and tax paid. Transport of the goods is under the cover of documents prescribed under Section 44 of the Act. No sales or purchase is outside the record of the assessee and no adverse remarks or record have been established against the petitioners either during the inspection or from the check-post data.

5. While so, it is the further case of the petitioners that suddenly the petitioners were served with a show cause notice purporting to revise the earlier notice. In the said show cause notice it was alleged that the books were rejected, because the electricity consumption showed excess consumption. The first respondent alleged that one bag of sago would consume 6 units of electricity, and one bag of starch consume 5 units, and accordingly electricity consumption was taken and huge proposal was issued. Similarly, notices were issued to various dealers like the petitioners herein in the months of August/September 2004 by the Commercial Tax Authorities in Salem, Athur, Namakkal, Rasipuram and Aroor Divisions. The petitioners herein brought to the notice of the Principal Commissioner through their Association (TASMA) on 16.09.2004 and reminders dated 07.10.2004 were also sent, but there was no response. It is the case of the petitioners that they filed their objections to the show cause notice and was served with the notice of impugned assessment. By the impugned assessment, the flat rate of electricity consumption has been adopted and it has been arbitrarily stated (without calling for the books of account) that the petitioners and similarly placed assessees had not furnished documentary evidence or qualitative details with gate pass copies. The best of judgment based on electricity consumption on generalised basis, according to the petitioners, is not a honest guess work.

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6. The learned counsel for the petitioners submitted that the impugned assessment orders are contrary to the law laid down by the Division Bench of this Honourable Court in the case of Kalyani Oil Mills Vs. The State of Madras, reported in 32 S.T.C. 542 and in the case of Madurai Soft Drinks (Private) Limited Vs. The State of Tamil Nadu reported in 60 S.T.C. 94. The learned counsel for the petitioners submitted that in the above said two decisions the following principles have been laid down:-

i) The assessing authority should have material to doubt the correctness or genuineness of the entries in the account books before proceeding to make the best judgment assessment, taking the electricity consumption as the basis for making an estimate.

ii) Actual test check should be done in the assessee's own factory.

iii) The assessing authority should gather comparable data from other similar oil mills.

iv) In the absence of actual test check, adopting a particular rate of consumption for estimation would be an arbitrary basis and therefore a best judgment assessment based on such arbitrary figure cannot legally be upheld.

7. On the above said submissions, the learned counsel for the petitioners submitted that the best judgment assessments / revised assesments made on the basis of the survey report prepared in the year 1994 based on the consumption of electricity alone without looking into the account books are nothing but arbitrary and submitted that the impugned assessment orders / revised assessment orders are liable to be set-aside.

8. Mr. S.Manohar Sundaram, learned Government Advocate (Taxes), on written instructions from the respondents, submitted that though no counter affidavit has been filed, the above writ petitions may have to be allowed with suitable directions to safeguard the interests of the Revenue. In fact, Mr. S.Manohar Sundaram produced a letter from the Commissioner of Commercial (Taxes) Chepauk, Chennai - 5 addressed to the Special Government Pleader (Taxes) High Court, wherein the Commissioner has given instructions to the Special Government Pleader (Taxes). A perusal of the said communication shows that the respondents are not in a position to sustain the assessment orders / revised assessment orders passed by the respective assessment officers.

9. Mr. S.Manohar Sundaram, learned Government Advocate (Taxes) submitted that in view of the above said law laid down in the two cases by two different Division Benches of this Court, the impugned proceedings cannot be sustained. But, further submitted that the assessees without resorting to the alternative remedy available under the Act have straightaway filed the writ petitions and hence the writ petitions may not be entertained. But I am unable to accept the said contention of the Government Advocate (Taxes), as the impugned proceedings are grossly erroneous and directly against the law laid down by the above said

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decisions of this Court. Therefore, when the impugned proceedings are directly against the law laid down by this Court, it is not just and equitable to direct the assessees to take recourse to the alternative remedy available under the Act. The learned Government Advocate alternatively submits that if this Court is inclined to set-aside the impugned proceedings, liberty may be given to the assessing officers to pass fresh assessment orders in accordance with law. The learned counsel for the petitioners has no objection for the same and in fact he cannot have any objection for the same.

10. Accordingly, applying the law laid down by the two Honourable Division Benches of this Court in the above said decisions, viz., Kalyani Oil Mills Vs. The State of Madras, reported in 32 S.T.C. 542 and in the case of Madurai Soft Drinks (Private) Limited Vs. The State of Tamil Nadu reported in 60 S.T.C. 94, the impugned proceedings are set-aside. But however, the respective assessing officers are at liberty to pass fresh assessment orders / revised assessment orders in accordance with the law, more particularly applying the law laid down by this Court in the cases mentioned supra.

11. For the foregoing reasons, the above writ petitions are allowed. No costs. Consequently, the connected pending WPMPs are closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

srk

To

1. The Deputy Commercial Tax Officer,
Attur (Rural) Assessment Circle,
Attur.

2. The Deputy Commercial Tax Officer,
Attur (Town)

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3. The Salem Starch and Sago
Manufacturers Services Industrial
Co-operative Society Limited,
Omalur Main Road, Salem-636 302.

4. The Secretary to Government
State of Tamilnadu,
Department of Commercial Taxes
and Religious Endowments
Fort St. George, Chennai-9.

5. The Deputy Commercial Tax Officer
Suramangalam Circle, Salem.

6. The Commercial Tax Officer,
Suramangalam Assessment Circle,
Salem.

7. The Commercial Tax Officer,
Annadhanapatti Circle, Salem.

8. The Deputy Commercial Tax Officer,
Harur.

9. The Deputy Commercial Tax Officer,
Rasipuram.

10. The Commercial Tax Officer,
Suramangalam Circle, Salem.

11. The Deputy Commercial Tax Officer,
Kallanathan Post,
Attur Taluk, Salem District.

35 ccs to The Special Government Pleader, (Taxes) High Court, Madras-104.
SR.Nos.19324 to 19332, 19334, 19335, 19337 to 19342.

Writ Petition Nos.35348, 32093, 32094, 32095, 32096,
32097, 33789, 32098, 32099, 32100 of 2004,
etc. Batch.

Sgl(co)
Km,kk,nm,dv,sr,rsm,gp/
Compared by Bp/Sv.

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